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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

COAST REHABILITATION SERVICES, INC., Plaintiff, Cross-defendant and Respondent, v. THE DORTON FIRM PC, Defendant, Cross-complainant and Appellant.	2d Civil No. B236281 (Super. Ct. No. 1370065) (Santa Barbara County)

Plaintiff filed an action against a law firm for breach of contract. Defendant cross-complained alleging fraud, among other causes of action. The trial court directed a verdict in favor of plaintiff and dismissed the cross-complaint with prejudice.

On appeal, the defendant contends the judgment was rendered by the trial court in retaliation for filing a statement of disqualification pursuant to Code of Civil Procedure section 170.1.[1] The record shows, however, that the judgment was entered after defendant abandoned the trial. We affirm.

[1] All statutory references are to the Code of Civil Procedure.

FACTS

The Dorton Firm, P.C. is a law firm. It retained Coast Rehabilitation Services, Inc. (Coast) to prepare an Adult Life Care Plan for a client in a medical malpractice action. The firm paid Coast a $2,500 retainer. Later, the firm paid Coast an additional $2,500 for a Vocational Evaluation for the client. The retainer agreements provide that the "retainer is not intended to cover the full amount of [Coast's] fees, but is considered an initial payment which is credited against future billings."

The firm refused to pay any of Coast's additional billings. Coast filed an action against the firm for breach of contract. The complaint requested damages in the amount of $11,369, including interest.

The firm cross-complained for fraud, negligence, breach of contract, unjust enrichment and defamation. The cross-complaint alleged Coast represented the Adult Life Care Plan could be completed for approximately $2,500; that Coast did not give the firm notice before billing an additional $9,330; that the plan could not be used at trial because it contained inaccuracies; that the additional $9,330 is an unreasonable amount; and that Coast defamed the firm by making statements to persons, including debt collectors, that the firm failed to pay money owed to Coast.

Fred Dorton, Jr., represented the firm at trial.[2] From the beginning, matters did not go smoothly.

The trial court ordered that trial would begin every morning at 8:45. Prior to the pretrial conference, Dorton emailed the trial court requesting that trial begin at 10:00 a.m., on the first three days. He explained that his wife would be out of town and he had to take his children to school at 8:00 a.m. on those days. He further explained that his office was approximately two hours from Santa Barbara. The trial court denied the request. It stated it could not inconvenience 14 jurors, four staff, opposing counsel and the plaintiff.

[2] Hereafter, the Dorton Firm and Fred Dorton, Jr., are collectively referred to as Dorton.

The pretrial conference was set to begin at 1:30 p.m. It did not begin until 1:36 p.m. The court admonished Dorton to be on time.

At the pretrial conference, Dorton stated that if the trial court would not grant his request to start at 10:00 a.m. on the first three days, he would file a motion to disqualify the trial court pursuant to section 170.6. The judge stated the motion would be untimely because he had already made a number of decisions in the case.

Dorton made the section 170.6 motion before a different judge appointed by the Presiding Judge. The judge found the motion untimely. Nevertheless, he ordered that trial begin at 10:00 a.m. on the three days Dorton requested.

On June 22, 2011, trial was to begin at 8:45 a.m. At 8:17 a.m., Dorton sent an email to the trial court stating he may be delayed by fog and traffic. At 9:09 a.m., he sent a second email stating he would be late because his car battery gave out. When trial began at 9:35 a.m., he apologized to the jury for being late. He said his children "were watching a DVD, which unfortunately caused [him] some hassles this morning . . . ."

During trial, the court made a number of rulings adverse to Dorton's case. Matters came to a head during the testimony of Attorney Stephen King.

At about 4:00 p.m., on June 23, 2011, Dorton called King as a witness. King was cocounsel on the malpractice case that gave rise to the contract with Coast. Before King testified, the trial court warned Dorton that if King was unable to return the next day, Dorton must find a way to get his testimony in and give Coast's counsel a chance to cross-examine.

During cross-examination, Dorton requested a sidebar conference. The following colloquy took place at the side bar:

"THE COURT: We're at the side-bar. Mr. Dorton, it's 4:25.

"MR. DORTON: Correct. [¶] I just want a little fairness in this case. This morning [Coast's counsel] indicated that his witness had a dental appointment, and that she would not be able -- she had to leave at 11:30, and your Honor told me that if she left, or if I didn't finish with her testimony before 11:30, then you would allow her to leave, and if she wasn't able to come back, then, you know, you were going to try to do what

you could. [¶] Now with Mr. King you're indicating that if he's not able to testify, you'll force him to come back tomorrow morning, which is again, in my opinion, totally different treatment than what occurred this morning with [Coast's counsel].

"THE COURT: It's not different treatment at all, Mr. Dorton. I told you at 4:00 o'clock. I gave you a heads up, if you call a witness at 4:00 o'clock, and you expect him to be done by 4:30, you have to leave the other side a reasonable time to finish cross-examination, or I'm required to strike the testimony. It's the only option I have. [¶] You called him at 4:00 o'clock. I gave you a heads up. I said, 'Be sure you take a look at the time.' You didn't say anything one way or the other as to what the situation was. [¶] Under the circumstances, I'm going to ask Mr. King if he can come back, and if he can't come back, I have no other option. You can't prevent the other side's Cross-Examination.

"MR. DORTON: Well, I want to make sure this record's clear. Your Honor did not indicate whatsoever that you would strike the testimony.

"THE COURT: I don't have any option, Fred.

"MR. DORTON: I want to finish my record.

"THE COURT: Now, wait a minute, wait a minute. You'll have a chance to finish your record. But right now I need to deal with Mr. King."

Dorton claims that the court made this last statement loudly, in an angry tone of voice that the jury could hear.

The court asked King whether he would be available to return the next day. King said he would. Cross-examination continued, and the court did not strike King's testimony. The court recessed for the day a few minutes later. The parties and the court met outside the presence of the jury The court inquired whether Dorton would like to finish what he was going to say for the record when the court interrupted him at the sidebar. Dorton said, "[Y]our Honor's rulings have been definitely not equal . . . ." The court thanked Dorton but made no reply.

The next morning at 7:23, Dorton sent the trial court an email stating that he was going to file a motion to disqualify the court pursuant to section 170.1. Dorton stated he would not be in court at 9:00 a.m. At 8:05 a.m., Dorton sent the court another

email stating he would file a section 170.1 motion when he arrived, and that unfortunately the case was taking place two hours from his home.

The trial court, having heard nothing further from Dorton, took the bench at 10:28 a.m. The court told the jury:

"All right, ladies and gentlemen, all of the members of [the] jury are in their assigned location. [Coast's Counsel] is here along with [Coast's President]. Mr. Dorton is not here and no one is here from his firm.

"I received an email from him this morning and he said he was not going to be here exactly at nine o'clock. And he also indicated he was going to file a motion to disqualify the judge. He can file whatever he likes but under the circumstances, it's my opinion that any issues that he has with me or my rulings have to be taken on appeal.

"In any event, it's my decision. I have waited now an hour and 28 minutes. It is just a few minutes until 10:30. I have informed the Presiding Judge and the Civil Presiding Judge, both of them, that my jurors are not going to be treated in this fashion. It is totally inappropriate. The juries and jurors' time and attention in a matter like this is not only deeply appreciated but under no circumstances is the Court going to tolerate the behavior of an attorney in this fashion. If a lawyer is unhappy with rulings or decision of the judge, they have their remedies, but it is not to take it out on the jurors.

"Under the circumstances, all I can say, you probably know by looking at me I have been in this courtroom case [*sic*] a long time. I started in this courtroom in 1965 I practiced here ever since then. I never seen or heard of this kind of a situation occurring, ever. It is brand new.

"But under the circumstances, if Mr. Dorton elects simply not to show up, then it's going to be left with the Court to make a decision."

The trial court found that Dorton had abandoned the case. The court directed a verdict in favor of Coast in the amount of $10,444, and dismissed the firm's cross-complaint with prejudice.

Dorton arrived in court at 10:50 a.m., with his associate counsel. Coast's counsel and 10 jurors were still present. Dorton stated he wished to make a record. The court replied that the case was over and there was nothing to put on the record.

Dorton filed a motion to disqualify the trial court pursuant to sections 170.1 and 170.3. The motion was heard by a superior court judge appointed by the Chairperson of the Judicial Council (§ 170.3, subd. (c)(5).) The judge denied the application to disqualify the trial court. The judge found:

"1. Defendant failed to present its verified statement objecting to the trial before Judge Anderle at the earliest practicable opportunity after discovery of the acts cited as grounds for disqualification [§ 170.1, subd. (c)(1)];

"2. No person aware of the facts might reasonably entertain a doubt that Judge Anderle would be able to be impartial in this matter [§ 170.3, subd. (a)(6)(A)(iii)]; and

"3. Judge Anderle has neither harbored nor exhibited any bias or prejudice toward a lawyer or party in the proceedings [§ 170.1, subd. (a)(6)(B)]."

The firm moved for a new trial. The motion alleged that irregularity in the proceedings denied Dorton a fair trial; jury misconduct; insufficiency of the evidence; and the judgment is against the law. The trial court denied the motion.

DISCUSSION

I

Dorton contends Judge Anderle was automatically disqualified for bias.

But Dorton's motion to disqualify was denied. The exclusive means by which a party may seek review of a denial of a motion to disqualify is by a petition for writ of mandate (§ 170.3, subd. (d).) The denial is neither appealable nor reviewable on appeal from the judgment. (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 487.)

II

Dorton contends the judgment is void.

Dorton's contention is based on the theory that the trial court lost jurisdiction when Judge Anderle learned of the grounds for his disqualification. Dorton claims Judge Anderle learned of the grounds for his disqualification when Dorton complained of his unfair rulings during trial and when Dorton sent the judge an email expressing his intention to file a motion to disqualify.

Dorton relies on section 170.3, subdivision (b)(4). That subdivision provides in part: "If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself . . . ."

Apparently under Dorton's' interpretation of section 170.3, subdivision (b)(4), whenever a party complains the trial court's rulings are unfair or sends an email stating the intention to file a motion for disqualification, the trial court loses fundamental jurisdiction. Such an interpretation would be a boon for any party whose case is not going well, and a disaster for the administration of justice. Fortunately for the administration of justice, Dorton's interpretation is wrong.

Section 170.3, subdivision (b)(1) begins "A judge who determines himself or herself to be disqualified . . . ." Subdivision (b)(4) of the section applies only under those circumstances. It does not apply to a mere allegation of bias.

Even after a formal motion for disqualification is filed, the trial court is not deprived of fundamental jurisdiction at least where, as here, the trial has commenced. Section 170.4, subdivision (c)(1) provides in part: "If a statement of disqualification is filed after a trial or hearing has commenced . . ., the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. (See *Eckert v. Superior Court* (1999) 69 Cal.App.4th 262, [where motion to disqualify for cause was filed after in limine rulings, trial judge was not required to stay the proceedings].)

III

Dorton contends that if the judgment is not void, it is voidable.

Dorton relies on section 170.3, subdivision (c)(5). He believes that when a motion for disqualification is filed section 170.3, subdivision (c)(5) requires the trial judge to stay the proceedings and immediately seek out another judge to rule on the disqualification.

Dorton misinterprets section 170.3, subdivision (c)(5). The subdivision prohibits a judge from ruling on the motion to disqualify him, and requires that the motion be decided by another judge. It does not, however, require the court to stay the proceedings. In fact, section 170.4, subdivision (c)(1) expressly empowers the trial judge to proceed with the trial.

Dorton argues that he subpoenaed Judge Anderle to testify at the motion for a new trial. He points out that a judge is disqualified if it is likely he will be a material witness. (§ 170.1, subd. (a)(1)(B).)

But Dorton fails to cite any authority for compelling the trial court to testify at a motion for a new trial. (See § 660 [specifying the matters to which reference may be made at the hearing on a motion for new trial].)

IV

Dorton contends a new trial must be granted.

Dorton argues Judge Anderle was prejudiced against him from the beginning of the trial. But Dorton raised that issue in his motion to disqualify Judge Anderle. The motion was denied and Dorton did not seek review by petition for writ of mandate. We have no power to review that ruling on appeal. (§ 170.3, subd. (d).)

In any event, the record shows the judgment against Dorton was not the result of any bias on the part of the judge or jury. Nor was it the result of any evidentiary rulings. Instead, the record clearly shows the judgment was the result of Dorton's abandonment of his case.

The trial court ordered Dorton to appear for trial at 8:45 a.m. On June 24, 2011, at 10:30 a.m., when Dorton had not yet appeared, the court directed a verdict in favor of Coast and dismissed Dorton's cross-complaint with prejudice. Dorton finally appeared at 10:50 a.m.

At the time the trial court found Dorton had abandoned the case, it had no idea when Dorton might decide to appear. The jury, court staff, opposing counsel and judge had been waiting an hour and a half. Dorton showed a complete lack of consideration for everyone's time but his own. His only excuse was that he was preparing a section 170.1 challenge and that he lived two hours away from the court. It is an understatement to say Dorton's actions were inexcusable.

On appeal, Dorton refuses to acknowledge that he abandoned his case. Reading his opening brief, one would assume that when he finally arrived for trial, he was greeted with a directed verdict and a dismissal made in retaliation for his section 170.1 disqualification motion. The opening brief fails to acknowledge the truth. The trial court was well within its discretion in directing the verdict and dismissing the cross-complaint

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

The Dorton Firm, Fred D. Dorton, Jr., Sana Z. Shah for Defendant and Appellant.

Law Offices of Jeffrey S. Young, Jeffrey S. Young for Plaintiff and Respondent.